United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

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77-1035

To be argued by
SAMUEL H. DAWSON

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1035

UNITED STATES OF AMERICA,
Appellee,

—against—

PASQUALE MADDALENA,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE

DAVID G. TRAGER,
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Preliminary Statement

Appellant, Pasquale Maddalena, appeals from a judgment of conviction entered on January 7, 1977 after a jury trial in the United States District Court for the Eastern District of New York (Weinstein, *J.*), which judgment convicted appellant of five counts of receiving and accepting sums of money from various federally inspected meat packing companies during the course of his employment as a United States Department of Agriculture meat inspector, in violation of Title 21, United States Code, Section 622. Appellant was sentenced to concurrent terms of eighteen months imprisonment on each count, and is presently enlarged on bail pending appeal.

On this appeal, appellant understandably does not challenge the sufficiency of the evidence against him, but

rather alleges (1) various errors in connection with the Government's introduction of evidence establishing prior similar criminal conduct on the part of the appellant, and (2) that a portion of the prosecutor's summation was prejudicial and inflammatory.

Statement of Facts

As a result of the enactment of the Federal Meat Inspection Act of 1967, meat packing companies doing business in interstate commerce are required to apply for, and obtain, daily federal inspection from the Department of Agriculture (29).[1] Under the Act, a federal meat inspector engages in a daily examination of an establishment's operation (83, 131-132, 181, 202, 242). Such monitoring includes the evaluation of a company's on-going program of sanitation, and the taking of remedial action where appropriate (80, 180, 203, 242). The Government's case consisted in the main of the testimony of representatives of five federally inspected meat packing companies who had paid the appellant, a United States Department of Agriculture meat inspector, varying amounts of money during the period of his assignment at those establishments.[2]

The common thread running through the testimony of the various witnesses presented by the Government was

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[1] Numbers in parenthesis refer to the pagination of the transcript of the trial.

[2] The parties stipulated that during the time periods set forth in each count of the indictment the appellant was a United States Department of Agriculture meat inspector and had been assigned inspection responsibilities at Omaha Hotel Supply Corporation; George Korn and Sons, Incorporated; Bornstein Brothers, Incorporated; AAA Meat Provisions, Incorporated; and Jacob Zucker, Incorporated (28, 39-40).

the system of harassment instituted by the appellant at most of the packing companies enumerated in the indictment (44-45, 116-117, 135-136, 183, 207-209). Though the frequency or nature of the harassment would differ from establishment to establishment, its effect would often be the slowing or stopping of the particular plant's operation (122, 135-136, 183, 207-208). Presented with the appellant Maddalena's ability to utilize his prerogatives in such a manner, the operators of the packing companies would thereafter pay the appellant varying sums of money on a weekly basis over the balance of his assignment tour in order to keep him from hindering the operation of their businesses (47, 86-87, 116-117, 133-136, 181-183, 209-210).

Salvatore Cucurullo and Steven Korn, the retired foreman and current president, respectively, of George Korn and Sons, Incorporated, testified that Maddalena had been an inspector at the Korn plan from September, 1973 to January, 1974 (42, 83). At Korn, Maddalena quite properly pointed out to Cucurullo and Korn matters in the operation which required correction (42, 46-47, 83-84). However, after calling deficiencies to their attention by the "tagging" method, Maddalena would then disappear for long stretches of time (44-47, 116-117).[3] Though a problem might be soon remedied, Maddalena's disappearance would effectively idle Korn's employees and halt the momentum of operations. (117-118). Consequently, Korn

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[3] "Tagging" is a procedure whereby an inspector prevents a company from using a particular piece of equipment or an area of its premises until some deficiency, usually a sanitation problem, is corrected. This is accomplished by the placing of a tag on the equipment or a string across a doorway. When the inspector determines that the condition has been corrected, the tag or string is removed and operations may resume (43-46, 122, 136-137).

gave Cucurullo twenty-five dollars which in turn was paid to the appellant (47). Such payments were made to Maddalena each week, usually on a Friday, during his assignment to Korn (48, 84-85).

Leonard Katz, president of AAA Meat Provisions, Incorporated, testified to making similar weekly payments to Maddalena while appellant was assigned to AAA from January, 1974 to April, 1974 (133-134). At the commencement of his tour of duty at AAA, Maddalena brought his authority fully to bear upon Katz' company. On his very first day at AAA, Maddalena shut down operations and vanished (136).[4] After the first or second week, Maddalena advised Katz that he wanted to be taken care of the same way Katz had dealt with previous inspectors

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[4] The testimony of Katz on this point was quite specific. After previously testifying to the sanitation procedures employed at AAA (132), he related the methods of the appellant.

"Q. [By Mr. Dawson, the prosecutor] What was it that had occurred if anything that gave rise to your paying the defendant $50 every week? A. Well, when Inspector Maddalena started, first thing they [sic] come in in the morning. He tied me up completely.

Q. Could you explain what you mean by that? A. The place has to be washed, the tables are not cleaned, and he said I cannot operate.

Q. When he came in that morning and told you that, had your sanitation crew been at work the night before cleaning? A. Yes, same thing.

Q. What had occurred, would you continue telling the ladies and gentlemen? A. The place is filthy, I have to wash it up and he has to come back and reinspect the place, then I could start if he okayed it. I did so, and I asked him, where can I reach you, he said—he said he'll be around. I knew all the houses which he had the establishments, I called, he was not there, I had to look for him. I was waiting for a long time.

Q. Could you operate while he was gone? A. No." (135-136).

(148-149). Thereafter, Katz paid appellant fifty dollars every week until Maddalena left AAA in April, 1974 (133-134).

With Jack Bornstein, the secretary-treasurer of Bornstein Brothers, Incorporated, Maddalena was perhaps the most explicit in his demands for weekly payments. At the conclusion of appellant's first week at Bornstein Brothers, Maddalena announced to Bornstein that he "expected to be taken care of" (181-182). Moreover, when Bornstein tendered twenty-five dollars to him, Maddalena voiced his dissatisfaction at the amount and demanded, and received, fifty dollars (182). At Bornstein Brothers too, the payments to Maddalena were regularly made each week for the three month period of his assignment there (39-40, 182).

Unlike the other owners, Jeffrey Rubin, president of Jacob Zucker, Incorporated, testified that Zucker was not harassed in its operation by appellant. On the contrary, Rubin acknowledged that Maddalena treated Zucker fairly and without any difficulties being encountered (248). Rubin related that his company, through its foreman, had made weekly payments to meat inspectors assigned to Zucker (244-245).[5] In the month of December, 1973, with the foreman Borriello away on vacation, Rubin paid Maddalena twenty-five dollars on several occasions (247). Moreover, Rubin had observed several instances when the foreman paid Maddalena with money provided by Rubin (247-248).

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[5] At the time of trial, Antonio Borriello, Zucker's foreman, was vacationing in Naples, Italy (244). According to Rubin, the foreman would obtain twenty-five dollars each week from Rubin and thereafter pay the inspector (244-245, 248). When Borriello would take his vacation in Italy, each December, Rubin himself would deal directly with the inspector, making the payments usually on a Friday, in his office or a cooler (245-246).

The remaining witness for the Government was Joseph Daren, president of Omaha Hotel Supply Corporation.[6] Count One of the indictment alleged that the appellant was assigned as an inspector to Omaha for one week in February, 1973, during which period Maddalena received a payment of twenty-five dollars. According to Daren, the appellant so "harassed" and "coerced" Omaha during his first four days there that Daren felt compelled to make payment (222).

After the selection of the jury, but prior to the examination of any of the witnesses, the Government advised the trial court that it had provided the defense with all Jencks Act[7] material, as well as all the exhibits it intended to introduce at trial (A1).[8] Though the Government had evidence that appellant committed six acts similar to those charged in the indictment, it alerted the trial court and the defense that it sought to introduce only two such acts (A8-A9, A2-A3). Counsel for the Government stated that the two witnesses who would testify to Maddalena's similar criminal conduct would demonstrate the nature of appellant's harassment activity at their companies as well as their paying him money on a weekly basis (A2-3). The trial court inquired as to how far removed in time the similar acts were to the time span in the indictment, and whether the appellant did indeed pursue the same course of conduct at the uncharged companies as he allegedly had at those enumerated in the indictment (A3). Judge Weinstein initially ruled that

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[6] At trial Daren actually preceded Jeffrey Rubin in the testimony. However, to facilitate the factual presentation surrounding Daren's testimony of Maddalena's prior similar conduct, his testimony is discussed out of its trial sequence.

[7] 18 U.S.C. § 3500.

[8] Numerical references preceded by "A" in parenthesis refer to the pagination of the Government's Appendix.

the evidence of prior similar conduct could be introduced via cross-examination of the appellant or upon a Government rebuttal case (A5). The trial judge rejected defense counsel's primary objection to the introduction of the evidence, to wit: that all such evidence to be admissible must be presented to a grand jury, and if not barred by the statute of limitations, must result in an indictment (A3-A5). However, the Court ruled that some advance notice to the defense would be required and therefore the evidence would not be introducible until after the weekend recess (A5).[9]

Aware of the judge's ruling precluding similar act evidence until cross-examination of the appellant or upon rebuttal, defense counsel in his opening statement suggested the improbability of Maddalena accepting payments during the relatively brief periods charged, particularly when, as he stressed, there was an absence of such conduct prior to, or subsequent to, that alleged in the indictment (25).[10] Finding that such statements took unfair ad-

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[9] The trial commenced on Wednesday, December 22, 1976. On that day a jury was selected and opening statements made. On Thursday, December 23, 1976, three witnesses testified for the Government, none of whom involved similar act evidence. The trial judge then recessed the trial until Monday, December 27, 1976 (1, 34, 36, 172).

[10] As counsel stated:

> "In one case and at only one time where he worked perhaps three or four days, in another case for a couple of months—very short periods of time, and all, mind you, from September '73 up to a few months in January, February or March of '74.
>
> I can give it to you specifically from the indictment, but it's not necessary at this time.
>
> Here we have a man who isn't accused in this indictment, mind you, of being on the take before this period, when he worked there for four years, and what's more important, he is not accused of being on the take after this short period, and he receives commendations and awards from his employer." (25)

vantage of his earlier limitation on the use of such evidence, Judge Weinstein ruled that the similar act evidence would now probably be permitted on the Government's direct case (A6-A7).[11]

When the trial resumed the following week, the prosecutor stated that he would limit the proposed similar act testimony to one witness (176-177). Rather than introduce a new witness for such testimony, the evidence of similar acts was recounted by Joseph Daren, who directly related his payments to Maddalena that one week in February, 1973,[12] to appellant's harassment activity at Omaha in 1972 (204-210). With respect to the similar act, Daren testified that Omaha used a stainless steel and plastic conveyor belt system to move the meat within its plant. Maddalena prevented the use of the conveyor belt (207-208). Omaha's product was then put into tubs for movement. Maddalena halted the use of the tubs (208). Omaha then used dollies to convey its product, but their use was also terminated by appellant (209). Finally, Daren and his employees had to hand carry the meat to the shipping section of Omaha (209). As Daren put it:

> ". . . . Nothing could move. Nothing could go. Everything just stopped. And, frankly speaking we were at our wit's end." (207).

Consequently, Daren paid Maddalena twenty-five dollars each week in 1972 that appellant worked at Omaha (209). After these payments began there were no further orders from Maddalena preventing the use of facilities at Omaha.

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[11] While the trial court did not expressly so rule, it is implicit in the colloquy between the court and counsel.

[12] As charged in Count One of the indictment.

The appellant's case consisted of the introduction of testimony from two character witnesses and a number of Department of Agriculture records reflecting his promotions, commendations and receipt of merit awards (270-271, 273).

ARGUMENT

POINT I

The trial court correctly admitted testimony concerning a prior similar act and did so under instructions which properly delineated the use of such evidence by the jury.

Appellant contends that the introduction of prior similar act testimony concerning his assignment at Omaha Hotel Supply Corporation in 1972 was unwarranted under the circumstances of the case; was admitted without proper instructions; and was furnished to the defense with insufficient time to prepare to meet it.

A. The admissibility of prior similar act testimony.

In this Circuit, evidence of prior similar acts is generally admissible, except where it is solely designed to show the criminal character or disposition of a defendant. *United States* v. *Papadakis*, 510 F.2d 287, 294-295 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975); *United States* v. *Deaton*, 381 F.2d 114, 117 (2d Cir. 1967). Rule 404(b) of the Federal Rules of Evidence continues the prohibition against the use of such evidence to establish criminal character, but sets forth by way of illustration some of the permissible purposes similar act evidence can serve. Rule 404(b) states:

> "Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person

> in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of notice, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

It is suggested by the appellant that since the evidence of the similar act offered in this case fails to come within any of the categories specified in Rule 404(b) it can only be concluded that the evidence was introduced for the sole purpose of establishing Maddalena's bad character.[13] Such argument misperceives the factual basis of the evidence and misconstrues the applicable legal principles involved. Rule 404(b) by its express terms does not seek to define all possible rationales for the admission of similar act evidence. It merely sets forth some of the more common usages of such evidence. Moreover, Rule 404(b) leaves intact the line of cases in the Second Circuit which expresses the rule of admissibility of similar act evidence in an inclusory form, that is, the evidence is admissible except when offered *solely* to demonstrate criminal character. *United States* v. *Deaton, supra; United States* v. *Crisona*, 416 F.2d 107 (2d Cir. 1969); *United States* v. *Vario*, 484 F.2d 1052, 1056 (2d Cir. 1973), *cert. denied*, 414 U.S. 1129 (1974); *United States* v. *Papadakis, supra; United States* v. *Campanile*, 516 F.2d 288 (2d Cir. 1975).

As developed at trial, the facts of the instant case permit several justifications for the introduction of the prior similar act. Daren testified that Maddalena worked at Omaha for only a few days in February, 1973, at the end of which appellant was paid twenty-five dollars. Compared to the testimony of the other owners demonstrating payments to appellant over several months, this

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[13] Appellant's Brief, at 5.

single payment might seem improbable. However, when coupled with Maddalena's conditioning of Omaha to make payments, as a result of his activity there in 1972, this single payment is given context and meaning. Rather than introducing the 1972 act to show bad character, the prosecution showed, via the similar act, why the 1973 payment was made at all. Maddalena's harassment of Omaha in 1972 was so logically and inextricably connected with his receiving money there in 1973 as to form a part of appellant's plan, system and pattern of conduct as charged in the indictment. *United States* v. *Campanile*, *supra*, at 292; see, *United States* v. *Hughes*, 441 F.2d 12, 20 (5th Cir.), *cert. denied*, 404 U.S. 849 (1971).

Appellant sought to establish through cross-examination of packing company owners who had preceded Daren that Maddalena was a tough, vigorous inspector, who caused them to bear heavy costs in making corrections and improvements to their operation. Daren's testimony clearly portrayed the ultimate end Maddalena's vigor was *designed* to achieve. It was quite apparent that appellant completely disrupted operations at Omaha and elsewhere, in order to soften and condition the companies to his payment demands. Such a premise for similar act evidence is entirely compatible with the requirements of Rule 404(b). *United States* v. *Wright*, 466 F.2d 1256, 1258 (2d Cir. 1972), *cert. denied*, 410 U.S. 916 (1973); *United States* v. *Freedman*, 445 F.2d 1220, 1224 (2d Cir. 1971).

Appellant suggests that since there was no issue raised by the defense as to Maddalena being assigned to the companies, the question of identity afforded the trial court an insufficient premise to admit similar act testimony.[14] However, though the defense stipulated that

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[14] Appellant's Brief, at 4.

Maddalena was employed as an inspector at each of the companies for the period charged in the indictment, the record reveals that a significant portion of cross-examination was directed towards probing the various witness' abilities to recall the circumstances surrounding the alleged payments.[15] This effort, when coupled with testimony elicited by the defense that over the years many inspectors were assigned to the companies, was quite clearly designed to call into question the identity of Maddalena as one of the inspectors who had received payments.[16]

The trial judge was therefore fully warranted in permitting similar act testimony from Daren, in light of the issue of identity raised by appellant during the cross-examination of earlier Government witnesses.[17]

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[15] George Korn and Son: (54-56, 70, 74-76, 97-98, 110-113); AAA Meat Provisions: (145-146, 151); Bornstein Brothers: (195-198).

[16] Defense counsel argued in summation:

"I am not accusing them [the owners] of not telling the truth. I am accusing them of taking certain liberties with the truth. You heard at least three of these people say that they don't recall specifically giving this man any money, but it had to be him because they did it with all the other inspectors... On such unreasonableness are you ready to convict, when his Honor will charge you that if you have a reasonable doubt about his failure to prove the defendant's guilt beyond a reasonable doubt, you must acquit. That is what I am arguing about." (311-312).

[17] Judge Weinstein stated:

"In view of the nature of the cross-examination, suggesting that the witnesses are mistaken about the identification of this defendant as the person who took bribes—not bribes—as supplement of their income, I think it is appropriate. You may continue. It will be limited to reduce the possible harm to the defendant, instead of using six prior acts you will use only one prior act. That seems reasonable." (177).

[Footnote continued on following page]

Appellant's argument that Daren's testimony about occurrences in 1972 was cumulative to his testimony concerning the activity in February, 1973 misses the point raised in *United States* v. *Byrd*, 352 F.2d 570, 575 (2d Cir. 1965), and cited by him. In *Byrd*, the Government witness, in addition to testifying to bribes paid to the defendant as charged in the indictment, testified to a bribe in a wholly unrelated matter. The court viewed this testimony as cumulative, and of little added value in determining the defendant's state of mind. In any event, the court noted that it did not have to determine the admissibility of such testimony since it was compelled to reverse the conviction due to erroneous jury instructions by the trial judge. If anything, *Byrd* demonstrates the acceptability of Daren's similar act evidence. For here, it can plausibly be said that Daren would not have paid Maddalena in 1973, *but for* appellant's harassment of Omaha in 1972.

B. There was sufficient time to prepare a defense to the similar act evidence.

The defense was advised at the commencement of trial of the Government's desire to introduce prior similar act evidence (A2-A3). At the trial court's direction, such evidence was not admitted until four days later (13, 204-207). This period was ample enough for ap-

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It should be noted that counsel for the defense at no time objected to the similar act testimony on the ground that it was not indeed similar or was too remote in time. Nor did he object that an inappropriate basis was offered for its introduction. See Rule 404(b). Rather, the only grounds raised in objection were: (1) The evidence should have been presented to the grand jury; (2) it was counsel's impression that no evidence of prior similar acts existed; and (3) there was no evidence that appellant worked at Omaha in 1972. (10-12, 176, 205).

pellant to prepare to meet the evidence. Indeed, not only was trial counsel given § 3500 material prior to any testimony, but he did not raise the claim that there was insufficient time to prepare (A4). It is difficult to speculate as to how counsel could have investigated the matter, since no Department of Agriculture records existed relative to 1972 and the only witness present at such 1972 payments was Daren himself (31, 230-231). No claim is raised that Daren refused or was unwilling to be interviewed by the defense. Moreover, the cross-examination of Daren as to specific incidents occurring between himself and Maddalena in 1972 indicates beyond doubt that the defense was prepared to challenge Daren's testimony as to both the 1973 and the 1972 payments (217-218).[18]

Finally, appellant's analogy to the defense of insanity is wide of the mark. As the Court well knows, a defense of insanity requires exhaustive investigation and often the marshalling of massive evidence of both lay and expert witnesses. See, *Freeman* v. *United States*, 357 F.2d 606 (2d Cir. 1966).

C. The instructions by the trial court were proper.

The court properly instructed the jury, at the time similar act evidence was introduced, and at the end of the case, as to the limited purpose of such evidence (A11-A12, A15-A16). The trial judge clearly admonished the jury that it would be "absolutely impermissible" for it to conclude from the similar act testimony that the appellant had a criminal disposition and therefore committed the offenses charged (A12). Furthermore, Judge Wein-

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[18] Daren was questioned about allegedly mislabelling meat in 1972; about Maddalena rejecting the basement at Omaha in 1972; and about the removal of a ceiling in 1972.

stein afforded counsel for the appellant an opportunity to suggest any other instruction on the issue. Counsel not only failed to tender any additional instructions, but he also did not take issue with the instructions given on the grounds of vagueness or confusion (A12). See Appellant's Brief, at 12.

The trial court's instructions on this issue were succinct, correct and did not belabor the point. See, *United States* v. *Deaton, supra.*

POINT II

The prosecutor's summation was not prejudicial to the appellant and did not deprive him of a fair trial.

Appellant claims that a segment of the prosecution summation was so inflammatory as to seriously prejudice his right to a fair trial. It is the Government's contention that the portion of the summation complained of was neither prejudicial, nor perceived to be so by appellant's trial counsel (A17-A18).

During cross-examination of several of the owners of meat packing companies, defense counsel sought to establish that the appellant was a tough, vigorous enforcer of the inspection rules. Indeed, he sought to demonstrate that federal meat inspection is necessary to protect the public interest in a clean and wholesome product, as of course it is (61, 107, 116, 142, 188-189, 220-221). Moreover, the implicit suggestion of this aspect of cross-examination was that, left to their own devices, meat company operators such as those testifying would foist tainted meat onto the public. The thrust of the Government's counter-argument was that Maddalena, rather than en-

forcing the regulations for the public's benefit, distorted them for his own improper purposes. Hence, when the prosecutor reminded the jury in summation of the public's stake in proper inspection, he did no more than point to a theme that had been running through both the Government's and the defense's case.[19]

But assuming, *arguendo*, that the prosecutor's statements in summation exceeded the bounds of proper comment, the appellant is not thereby entitled to a reversal of his conviction. In *United States* v. *D'Anna*, 450 F.2d 1201 (2d Cir. 1971), where the prosecutor in a tax evasion trial told the jury that they would bear an additional burden as taxpayers when someone does not pay his taxes, this Court stated:

> "Whenever an attorney passes bounds of permissible comment on summation, opposing counsel should object. The Trial Judge could then, if requested, reprove the offending counsel or declare a mistrial." *Id.*, at 1206.

Here, appellant's counsel did not object to the allegedly offending portion of the summation, nor did he request a curative instruction or declaration of mistrial. Therefore, this claim of error should not now be noticed on appeal inasmuch as it did not affect the substantial rights of the appellant.[20] *United States* v. *Indiviglio*, 352 F.2d

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[19] *Contra*, Appellant's Brief, at 14:

"The statements made by the prosecutor had nothing to do with the issues of the case."

[20] It seems to the Government that appellant's effort to equate himself with the defendant in *Malley* v. *Connecticut*, 414 F.Supp. 1115 (D. Conn. 1976), stretches to the breaking point. There, the prosecutor raised the spectre of a defendant selling drugs to minors (not charged in the indictment) and the evils of the "drug scene." Any such comparison to this case is far-fetched.

276, 280-281 (2d Cir. 1965) (en banc), *cert. denied*, 383 U.S. 907 (1966).

CONCLUSION

The judgment of conviction should be affirmed.

Dated: March 30, 1977

Respectfully submitted,

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